Chapter 2

The Public Trust Doctrine

The Public Trust Doctrine is one of the most unusual, powerful, and potentially useful doctrines for natural resource management in the United States' legal system (Sax 1999) and one that has a long history of development and application. To date, the doctrine forms no recognized basis of law in Canada, but valid arguments can be made that it may have application in the Canadian legal system (Maguire 1996).

In this chapter, we examine some of the basic characteristics of the Public Trust Doctrine to illustrate how the principles upon which it is based can and should be used by instream flow practitioners as the basis for advocating responsible aquatic resource management in the face of political and economic forces to the contrary that pose significant harm to public natural resources. (For a more thorough treatment of this subject, see Slade et al. 1997.)

SCOPE OF THE PUBLIC TRUST DOCTRINE

Where it is formally recognized, the Public Trust Doctrine is considered a mix of common law, state law, property law, and a public right (Dawson 1999; Sax 1999). This broad basis makes the doctrine flexible and reflective of current thinking, a fundamental right of all citizens, and a right that cannot be taken away (Blease 1999). The Public Trust Doctrine is of central importance to state instream flow programs because it forms the cornerstone of fishery and wildlife management agencies' resource management responsibilities, obligations, and opportunities.

In its traditional form, the Public Trust Doctrine requires that waters remain usable for the purposes of navigation (including small boats), related commerce, and fishing; that is, those water-based benefits held in trust for the enjoyment of each state's citizens. In some jurisdictions, the doctrine has recently been interpreted to encompass aesthetic beauty, recreation, and preservation of natural conditions of submerged and riparian lands. As common law, the Public Trust Doctrine has developed differently in

each state, but it generally requires that subject waters, lands, and dependent fishery and wildlife resources be managed for the benefit of each state's citizens to ensure long-term sustainability for trust purposes. In this sense, the doctrine can be considered a type of fiduciary responsibility of the government to manage specific resources for the general, sustained benefit of its citizens. However, state and provincial fishery and wildlife management agencies seldom have regulatory authority over management of fish and wildlife habitat; rather their role is that of environmental conscience for the state or province.

Too often the concept of "public interest" is considered the same as "public trust." As a rule, governments are typically charged with acting in the public interest and rightfully strive to base most decisions and actions on the public interest. In fact, the two concepts are considerably different. Public interest relates primarily to economic or value considerations. Thus, almost any action that has public value or generates economic gain is in the public interest. Public trust, conversely, refers to matters of common property (like water, fish, or wildlife) that is held in trust by a sovereign (state) for the use and benefit of the beneficiaries (present and future generations of citizens). Although the concept of public interest can and does complement public trust, it is quite possible (and common) that actions can be taken in the public interest that harm the public trust (R. Roos-Collins, senior counsel for the Natural Heritage Institute, personal communication).

DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE IN THE UNITED STATES

In the United States, the Public Trust Doctrine is common law that has been developed and articulated by courts in individual cases. Because it is common law, many of its characteristics are the same in each state; however, the exact nature of the doctrine is determined by each state on a case-by-case basis. Thus, there is no universally recognized application.

The Public Trust Doctrine, which originated as Roman Civil Code in the sixth century A.D., stated that, "By the law of nature these things are common to mankind--the air, running water, the sea, and consequently the shore of the sea." England

adopted the Public Trust Doctrine as common law, and the French Civil Code and Spanish Civil Law, likewise, acknowledged the concept of common property. In turn, the Public Trust Doctrine was imported into the 13 original U.S. colonies. Following independence of the colonies, the Public Trust Doctrine potentially became part of the basic law in each state. It remains valid today as common law in jurisdictions where its principles have been enacted in statutory laws (including the implementation of rules and policies) to manage subject waters and lands.

Pursuant to the Public Trust Doctrine, states hold the waters of navigable streams and their nonnavigable tributaries, submerged lands, and fishery and wildlife resources in trust for the benefit of all people (Sax 1999; *Illinois Central Railroad v. State of Illinois*, 146 U.S. 387 [1892]). These public resources must be used in a manner consistent with the enjoyment of public trust benefits as provided by the Public Trust Doctrine. Principally, the doctrine forms the "bedrock of modern (fish and) wildlife regulation" (Veiluva 1981). It is under the Public Trust Doctrine that courts and state legislatures have recognized their basic sovereign obligation to act in the best interests of their citizens and developed legal authorities for the states to control the management and use of fishery, wildlife, and water resources that are held in trust for the public.

State governments may also have trust responsibility and obligations for other natural resources (*United Plainsmen Association v. North Dakota State Water Conservation Commission*, 247 NW 2d 457 [1976]). In some jurisdictions, the trust has been interpreted to include the protection of fish and wildlife habitat, coastal access, and aesthetic characteristics, as well as traditional trust resources. Another application of the public trust may include the protection of public health and prevention of flooding, erosion, and water pollution (Dawson 1984).

Acknowledgment of the trust responsibility for water resources is growing slowly. The principal case establishing the role of the Public Trust Doctrine for water resources came in *National Audubon Society v. Superior Court of Alpine County* (189 Cal. Rptr. 346 [1983]) in which the California Supreme Court held that consumptive water rights are subject to the Public Trust Doctrine. This case is more widely known as the Mono Lake case. The doctrine requires the government to exercise its trust responsibilities

when making decisions about allocating resources to private uses. The government's failure to consider the public trust in allocating public water to individual use may result in the reversal of a decision, even years after the decision was made (Bingham and Gould 1992).

Another California case offers an example of courts applying the Public Trust Doctrine to streamflow. In *Environmental Defense Fund, Inc. et al. v. East Bay Municipal Utility District* (Superior Court for Alameda County, No. 425955, Statement of Decision [1989]), the court found that the Public Trust Doctrine applied to decisions allocating water in the American River. The judge also found that he had to coordinate the Public Trust Doctrine with the reasonable use doctrine found in Article X, Section 2, of the California Constitution (Somach 1990). This section of California's constitution declares that the water resources of the State of California must be put to beneficial use to the fullest extent of which they are capable, that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The judge found that, whenever possible, he was required to integrate the two doctrines rather than decide between them. Thus, the judge mandated a plan by which water could be diverted while instream values were protected.

Public Trust Doctrine Opportunities in Canada

Although the Public Trust Doctrine is relatively well established in the legal system of the United States, it has not yet been formally incorporated in Canadian law. To date, the doctrine has not formed the basis of a judicial decision in Canada although there have been unsuccessful attempts to test its existence (*Green v. R.,* 34 D. L. R. [3d] 20 [Ont. H. C.] [1972]). More recent arguments have described the Public Trust Doctrine in light of the long recognized right of Canadian subjects to access and use Crown resources for certain specified purposes (Maguire 1996).

Given the English and French roots of the legal system in Canada and the United States, where the Public Trust Doctrine exists in various forms, it is curious that the

doctrine has not developed along similar lines in each country. However, because the doctrine has not yet been formally recognized in Canada is not necessarily proof that it does not exist there. In the United States, the Public Trust Doctrine was first recognized by the United States Supreme court in the case of *Martin v. Waddell*, 41 U.S. (16 Pet.) 367(1842), and the concept of state trusteeship over public resources was formally recognized in 1892 (*Illinois Central Railway v. Illinois,* 146 U.S. 387 [1892]). Certainly there seem to be several factors suggesting existence of the Public Trust Doctrine in Canada whether or not it is formally recognized.

The French roots of the Public Trust Doctrine can be traced to the French Civil Code, which endorsed the concept of common property in "navigable rivers and streams, beaches, ports and harbors." The feudal system was exported to New France in the seventeenth century when all French colonies in the United States (including Louisiana) were declared subject to the legal system then in force in Paris (Reed 1986). Even after the conquest of Quebec by the British, the Quebec Act of 1774 preserved French Civil Law in Canada as well as, arguably, its philosophical feudal notions of common property. Section 109 of the Constitution Act*,* 1867, seems to affirm the Crown's underlying proprietary interest in all public land when it granted the beneficial use of all public lands to the provinces "subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

Despite some Canadian courts' assertions to the contrary, recent actions seem to suggest an implied responsibility to act in a trust-like manner to protect public benefits in some settings. Specifically in a 1990 decision (*R. v. Sparrow,* 1 S.C.R. 1075 at 1108, [1990]) the court ruled that Aboriginal rights to fish could be curtailed in an apparent move to recognize the government's responsibility to protect environmental resources for the public interest.

Other examples of the Public Trust Doctrine's existence in Canada are found in some of its territories. In 1990, the Northwest Territories enacted its Environmental Rights Act, which provided in Section 6 the need "to protect the integrity, biological diversity, and productivity of the ecosystems in the Northwest Territories" and the right to protect the environment and the public trust. In 1991, the Yukon Territory enacted its Environment Act in which it recognized that government is "trustee of the public trust to

protect the natural environment from actual or likely impairment." Neither of these statutes has yet been tested to affirm their effectiveness in protecting public natural resources. Until there is broader acceptance of a doctrinal concept in Canada similar to the Public Trust Doctrine applied in the United States, the actions of natural resource managers will be driven more by a desire to implement "wise policy" to protect the public interest than by a legal obligation imposed by a public trust.

DUTIES OF TRUSTEES

In settings where it applies, the Public Trust Doctrine creates a duty of supervisory control, or stewardship, over the waters of navigable streams, their nonnavigable tributaries, and fishery and wildlife resources. In addition, trust purposes and obligations are being extended to land resources (Sax 1999). Although navigable and nonnavigable waters are widely appropriated for drinking, industrial, agricultural supplies, or other off-stream uses, the Public Trust Doctrine requires that harm to trust purposes be prevented or minimized whenever feasible. Water rights or other regulatory approvals for private uses may not, and do not, vest in a manner harmful to these purposes. Further, such water rights must remain subject to review and amendment on the basis of current knowledge and needs. Put differently, no private uses are grandfathered against continuing supervision to achieve the trust purposes. Regulations that authorize such private uses should be administered in a manner consistent with trust purposes.

The leading precedent, *National Audubon Society v. Superior Court of Alpine County* (33 Cal.3d 419 [1983]), confirmed that the Public Trust Doctrine, as common law, implicitly conditions water rights granted under regulation. The Mono Lake cases concerned the City of Los Angeles Department of Water and Power's (LADWP) appropriation of all flows of the nonnavigable tributaries to Mono Lake, a terminal lake on the eastern slope of the Sierra Nevada in California. The California State Water Resources Control Board (SWRCB) had unconditionally granted these appropriation rights in 1941. The SWRCB based its granting of these rights on its interpretation that the California Water Code did not authorize any mitigation of foreseeable harm to

environmental quality. Forty-two years later, the level and water quality of the lake had declined to such an extent that great harm was occurring to habitat for migratory waterfowl, two species of invertebrates, and fish habitat in tributary streams. These streams once supported vibrant trout fisheries, but, after 42 years of exploitation, had essentially become dry washes. The California Supreme Court held that LADWP's rights remain subject to review and amendment under authority of the Public Trust Doctrine. The supreme court mandated that the lower courts and the SWRCB undertake an objective review to determine whether the trust purposes of the lake and tributaries could be restored and protected, and if such restoration would be consistent with LADWP's legitimate need to provide water supply. In subsequent proceedings, the SWRCB determined that it was necessary to reduce LADWP's water diversions from Mono Lake tributaries by three-quarters in order to raise and maintain the lake to a level sufficient to protect waterfowl and other avian and invertebrate species and to meet fish, habitat, and channel dynamic needs in the affected tributaries. The SWRCB also mandated that LADWP develop and implement a plan to restore the degraded stream channels.

The Shepaug River case in Connecticut (*City of Waterbury v. Town of Washington* No. X01-UWY-CV97-140886 [2/16/00]) is a critical holding that a water right must be used consistent with trust purposes as recognized by regulatory law. The case involved a challenge to the City of Waterbury's water diversion, which had begun 70 years before, and had recently been registered under Connecticut's 1982 Water Diversion Act. The diversion significantly diminished natural flows, adversely affecting aquatic biota and recreation. The decision held that the Connecticut Environmental Protection Act prohibited continuing diversion at a level that impaired the Shepaug River when prudent and feasible alternatives exist. Connecticut Attorney General, Richard Blumenthal, stated ". . . the decision is important because it explicitly recognizes that a river is an important and protected natural resource, regardless of its commercial value, and that neither older laws nor older contracts can take precedence over our broad environmental protection laws."

Navigable waters throughout the United States and Canada have been developed for water supply and other necessary off-stream uses. Although the Public

Trust Doctrine does not prohibit such development, it does direct that such uses should be consistent with trust purposes whenever feasible. The doctrine has not been implemented consistently in water allocation decisions, and, in fact, was seldom implemented until the late 1990s (Slade et al. 1997). This is evidenced by the widespread and substantial degradation or loss of fish and wildlife populations and habitats, even in circumstances where such degradation was avoidable. Of course, the Public Trust Doctrine has yet to be implemented at all in Canada; however, it seems well suited to help affirm Canada's expressed commitments to natural resource protection should future court or statutory action affirm its existence.

SUMMARY

The Public Trust Doctrine--one of many tools in the instream flow program's "tool bag"--forms the basis for much of natural resource management conducted by fishery and wildlife agencies in the United States. In jurisdictions where it exists, the doctrine can vary considerably in its form and application, as shaped by individual cases. Such variation can be viewed as both a strength and limitation. But, whether currently expressed in law or not, the tenets of the Public Trust Doctrine provide the legal basis and responsibility for states and provinces to actively advocate for aquatic natural resource management even in the face of strong political and economic forces to the contrary.

Although the Public Trust Doctrine is a potentially powerful tool when used in the right circumstances, it is most effective in tandem with other statutes, regulations, or policies. Moreover, the effectiveness of all these legal remedies increases when supported by sound, multidisciplinary scientific investigations. Such investigations should reflect the importance, dynamics, and interconnectivity of biological, physical, and hydrological processes. Because the doctrine forms the basis for resource decisions, the IFC encourages an awareness of its principles in whatever capacity the doctrine may exist in a particular jurisdiction. Perhaps more than any other legal instrument, the principles of the Public Trust Doctrine support state and provincial

instream flow practitioners who are confronted with activities that may harm public natural resources.